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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL MAINTENANCE CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether an employer's unilateral decision to terminate a losing portion of its operations solely for legitimate business reasons breaches the duty to bargain under Section 8(a)(5) of the National Labor Relations Act.

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IN THE

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OCTOBER TERM, 1980

FIRST NATIONAL MAINTENANCE CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, First National Maintenance Corporation, prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Second Circuit enforcing an order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the court of appeals (App. A at 1a)[1] is reported unofficially at 104 L.R.R.M. 2924. The findings of fact, conclusions of law and order of the National Labor Relations Board (App. A at 9a) are reported at 242 N.L.R.B. No. 72 (1979).

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1 "App. A" and "App. B" refer to the appendices to this petition for certiorari. Appendix A contains the judgment and opinions of the court below, and the decisions and orders of the National Labor Relations Board and the Administrative Law Judge. Appendix B contains the relevant provisions of the National Labor Relations Act.

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit enforcing the Board's order was entered on July 9, 1980. This petition was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and Section 10(f) of the National Labor Relations Act, as amended.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, are Sections 8(a)(1), 8(a)(3), 8(a)(5) and 8(d). They are set forth in Appendix B.

STATEMENT OF THE CASE

The petitioner provides housekeeping and maintenance services for various customers (A. 2).[2] It hires its own employees, and, as their sole employer, trains and supervises them in the performance of the contracted-for services at the customer's premises (A. 2). There is no interchange of petitioner's employees between customer locations (A. 85). During the spring and summer of 1977, the petitioner serviced between two and four nursing or old age homes, including the Greenpark Care Center in Brooklyn, where this case arose in July of that year (A. 84). Petitioner had been under contract with Greenpark since April 1976, and employed approximately 35 people in its operation there (A. 62-63).

Petitioner had first contracted on April 28, 1976 to provide services at Greenpark (A. 43-45). Under the agreement, and an annexed manual which described the overall basis for the services, petitioner furnished all necessary labor, supervision, training, tools, equipment and supplies required to do the work in a competent manner without interfering with the

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2 "A." refers to the Appendix in the Court of Appeals.

operations of the Center. In return, Greenpark provided necessary storage space, paid a management fee and reimbursed the petitioner for its gross weekly payroll and fringe benefits. (A. 43.)

Either party had the right to terminate the agreement at any time by serving the other with 30 days' prior written notice (A. 4). The agreement provided that, upon its termination, the Center would be prohibited from hiring any of petitioner's former employees for a period of 90 days (A. 44). In March 1977, the Center served such notice on petitioner because of the maintenance staff's purported lack of efficiency (A. 4). The parties were able to resolve this problem and the notice was rescinded (A. 4).

On March 31, 1977, the Board conducted a secret ballot election among petitioner's employees at Greenpark. On May 11, the Board certified District 1199[3] as the representative of those employees. On July 12, District 1199 wrote to petitioner (apparently for the first time) noting its certification and its right to bargain and negotiate a contract for petitioner's employees working at Greenpark, and concluded: "We look forward to meeting with you or your representative for that purpose." (A. 2, 39.)

In the meantime, on June 30, 1977, petitioner orally requested that the Center increase the management fee by $500 a week and advised the Center that if such an increase were not forthcoming the petitioner would discontinue its services effective August 1 (A. 72-73). A confirming mailgram to this effect was sent on July 6 (A. 40).

The April 28, 1976 agreement had set the management fee at $500 a week (A. 44). Effective November 1, 1976, the fee was reduced to $250 a week; it remained at that level through July 31, 1977, when petitioner withdrew from Greenpark

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3 District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO.

(A.38, 46, 78). It is uncontroverted that petitioner was losing money at Greenpark (A. 4).

Petitioner met with representatives of the Center on July 25 and was unable to negotiate an increase in the management fee (A. 74-75). Therefore, that same day, petitioner wrote to Greenpark to advise it that all services would be discontinued effective at midnight on July 31 (A. 41).

Petitioner advised its employees on July 28 that they would be terminated on July 31 (A. 3, 77). Upon hearing of this, a representative of District 1199 called one of petitioner's principals and asked if the union could wait a while before withdrawing and terminating the employees (A. 3, 79-80). Petitioner explained that if it stayed on beyond July 31 it would have to continue for another 30 days and that petitioner "couldn't afford it" (A. 80, 85). Petitioner suggested that the union representative discuss the matter with the Center to see if it would waive the 30-day notice provision. Given such a waiver, petitioner said, it "might be able to swing it so we would be able to sit down and talk about it." The representative of the union contacted the Center and was advised that it would have to get clearance from its attorneys. (A. 94.) The next day (July 29) the Center informed the union that it would not waive the 30-day notice provision (A. 98, 99).

Petitioner withdrew from Greenpark on July 31. On August 1, the representative of District 1199 met with the owner and other representatives of the Center and asked, among other things, if the Center would hire petitioner's former employees. (A. 99-101.) The union was then advised that a 90-day provision in the Center's contract with petitioner precluded it from hiring or keeping those people on the premises (A. 100). There is no evidence that the union requested that petitioner waive this provision.

The Board's Conclusions of Law and Order

The Board, substantially adopting the conclusions of law of the Administrative Law Judge, found that petitioner had violated Section 8(a)(5) by unilaterally closing its Greenpark operation without bargaining with the union about the decision and by failing to respond to the union's July 12, 1977 request for bargaining. The Board further accepted the ALJ's finding that by so refusing to bargain, petitioner had interfered with its employees' exercise of rights guaranteed to them under Section 7 of the Act, and thereby had violated Section 8(a)(1). The Board applied the doctrine it had established in *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 564-70 (1966), as modified by *General Motors Corp.*, 191 N.L.R.B. 951 (1971), *petition for review denied sub nom. International Union, UAW v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972), that an employer has a duty to bargain over a decision to close a portion of its business unless that decision involves "such a significant investment or withdrawal of capital as to affect the scope and ultimate direction of the enterprise" (App. A at 8a-9a, 20a-21a).

The Board's order directed petitioner to bargain with the union with respect to the decision to terminate its operation at the Greenpark facility and, in the event petitioner did not resume the Greenpark operation, with respect to the effects of the decision to terminate.[4] The Board also directed petitioner to reinstate the discharged employees if the Greenpark operation was resumed, and, if the operation was not resumed, to place the discharged employees on a preferential hiring list for employment in other operations. Finally, the Board ordered back pay for the discharged employees from

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4 The portion of the decision regarding "effects" was not a contested subject at the Board level, and is of no concern here. In a stipulation entered into prior to the submission of briefs to the court below, petitioner consented to the enforcement of the Board's order directing petitioner to bargain over the effects of its termination at Greenpark. In that stipulation the parties agreed that effects bargaining took place subsequent to the administrative hearing, with petitioner agreeing to the payment of severance pay to the affected employees. (A. 21-22.)

the date of discharge to the date of any agreement or impasse reached in collective bargaining with the union. (App. A at 11a-15a.)

The Decision of the Court of Appeals

The court of appeals, acting upon the petition of the Board pursuant to Section 10(f) of the Act, granted enforcement of the Board's order by a 2-1 vote (App. A at 7a). The court expressly declined to follow the *per se* approach established by the Board in *Ozark Trailers*, *supra*, but rather held that this Court's decision in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), supports a presumption that there is a duty to bargain over a decision to close a portion of an ongoing business (App. A at 4a-5a).

The court observed that there are conflicting positions in the circuits and a lack of clear direction under *Fibreboard* (App. A at 3a-4a). It reasoned that a partial closing "affects 'terms and conditions of employment' at least as much as does the decision to contract out which the Fibreboard Court found to fall within the literal meaning of the statute" (App. A at 5a). The court said that this presumption could be rebutted by a showing that the "purposes of the statute would not be furthered by imposition of a duty to bargain," but found that no such showing had been made in this case (App. A at 5a, 6a). Specifically, the court found that there was "sufficient reaso. to believe that, given the opportunity, the union might have made concessions, by accepting reduction in wages or benefits . . . or a reduction in the work force, which would in part or in whole have enabled Greenpark to give FNM an increased management fee" (App. A at 6a).

Judge Kearse, dissenting, would have denied enforcement of the Board's order on the ground that this Court's "carefully limited decision in Fibreboard . . . [does not require petitioner] to bargain over its decision to terminate" the Greenpark operation, especially since the losses suffered were unrelated to labor costs (App. A at 7a). She concluded that petitioner's decision "to conserve its capital by closing a losing

operation was a matter of fundamental entrepreneurial discretion and was not 'suitable for resolution within the collective bargaining framework' " (App. A at 8a, quoting from *Fibreboard Paper Products Corp. v. NLRB*, *supra*, 379 U.S. at 214).

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED TO END THE CONFLICT AMONG CIRCUITS CONCERNING THE DUTY TO BARGAIN OVER AN ECONOMICALLY MOTIVATED DECISION TO DISCONTINUE A PORTION OF A SUBSISTING ENTERPRISE.

The decision below conflicts with decisions in the Courts of Appeals for the Fourth, Eighth and Tenth Circuits, as discussed below, pp. 13-16, *infra*. This conflict results, as we show preliminarily, from divergent understandings of this Court's decisions in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964) and *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965). Review is required to resolve this conflict and to supply needed guidance on a recurrent question of importance to the economy and to the promotion of labor-management harmony.

A. *Fibreboard* And *Darlington:* Limited Inroads On Employer Prerogatives.

In its 1964 *Fibreboard* decision, this Court concluded that "the replacement of employees in [an] existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment . . . is a statutory subject of collective bargaining under § 8(d) of the Act. 379 U.S. at 215. In the opinion for the Court, Mr. Chief Justice Warren announced that this "decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy." *Id.*

In a concurring opinion, Mr. Justice Stewart, joined by Mr. Justice Douglas and Mr. Justice Harlan, wrote that *Fibreboard* "most assuredly does not decide that every managerial

decision which necessarily terminates an individual's employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty." *Id.* at 218. Further, as the concurring Justices noted:

> [T]here are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. [*Id.* at 223.]

The limited holding of *Fibreboard*, carefully drafted to discourage anything other than the most cautious extension of the duty to bargain into core areas of entrepreneurial decisionmaking, was followed by a similarly restrained holding in *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965). There, this Court concluded that an employer, even if motivated by anti-union animus, could lawfully close a portion of its enterprise (in this instance, terminating production at one location) if in so doing it was not seeking to chill unionism in the remaining portions of the enterprise and the employer could not reasonably have foreseen that such a closing would be likely to have that effect. 380 U.S. at 275. Although the Labor Board had found a refusal to bargain in violation of Section 8(a)(5) based on the allegedly discriminatory closing of a portion of the business in violation of Section 8(a)(3), this Court pointed out that this "finding was in part based on the determination that the plant closing was an unfair labor practice, and [that] no argument . . . [was] made that § 8(a)(5) requires an employer to bargain

concerning a purely business decision to terminate his enterprise. *Cf. Fibreboard Paper Products Corp. v. Labor Board* . . . ." 380 U.S. at 267 n.5 (citation omitted). In these circumstances, there was no need for this Court to reach the issue presented here; namely, whether there is an obligation to bargain concerning an economically motivated decision to close a losing portion of an ongoing business.

During the decade and a half that has elapsed since *Fibreboard* and *Darlington* were decided, the courts of appeals have grappled with this question. As we demonstrate below, the decisions are in substantial conflict.

B. Conflict Among The Circuits: Divergent Interpretations Of *Fibreboard* And *Darlington.*

Despite the carefully limited thrust of the *Fibreboard* opinions, the Labor Board, with very narrow exceptions, has in essence applied a *per se* rule, known as the *Ozark Trailers* doctrine,[5] requiring employers to bargain about economically motivated decisions to terminate a portion of an enterprise.[6] This rule is applied whether the terminated portion is a

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5 *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 564-70 (1966).

6 The Board allows that there is no duty to bargain over a partial closing decision where the closing removes the employer from a line of business or where factors beyond the control of the employer prompt the decision, such that discussion would be pointless. *See, e.g., Brooks-Scanlon, Inc.*, 246 N.L.R.B. No. 76 (1979) (no duty to bargain over decision to close sawmill due to insufficient supply of timber), *Stanley Oil Co.*, 213 N.L.R.B. 219, 224-25 (1974) (no duty to bargain over decision to withdraw entirely from equipment servicing business); *Summit Tooling Co.*, 195 N.L.R.B. 479, 480 (1972) (no duty to bargain where practical effect of decision was to remove employer from tool manufacturing business); *General Motors Corp.*, 191 N.L.R.B. 951, 952 (1971), *petition for review denied sub nom. International Union, UAW v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972) (no duty to bargain over transfer to a franchisee of leasehold interest and operating control of company-owned facility pursuant to policy of disposing of line of business).

manufacturing facility or, as in this case, a service operation,[7] and irrespective of the wisdom of the decision in terms of efficient allocation of the resources of the enterprise.[8] In response to this approach, the courts of appeals have reached conflicting decisions.

The Courts of Appeals for the Fourth, Eighth and Tenth Circuits have held that there is no duty to bargain over an economically motivated decision to terminate a portion of a business enterprise in the absence of anti-union animus violative of Section 8(a)(3). On the other hand, the Second Circuit here held that there is a presumptive duty to bargain, rebuttable only if it subsequently can be shown that bargaining somehow would not have served the purposes of the Act. The Third Circuit has also established a bargaining presumption, but one based upon somewhat different considerations; namely, a balancing of the employees' interest in preservation of employment against the employer's interest in effecting an expeditious decision to alter the scope of its business. *Brockway Motor Trucks v. NLRB*, 582 F.2d 720, 735-38 (3d Cir. 1978).

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7 *See, e.g., Metro Transp. Servs. Co.*, 218 N.L.R.B. 534, 536 (1975) (closing of one of two local pickup and delivery service operations); *Morrison Cafeterias Consol.*, 177 N.L.R.B. 591, 595-97 (1969), *enforcement denied*, 431 F.2d 254 (8th Cir. 1970) (closing of one of several cafeterias); *William J. Burns Int'l Detective Agency, Inc.*, 148 N.L.R.B. 1267, 1268 (1964); *enforcement denied*, 346 F.2d 897 (8th Cir. 1965) (termination of last security services contract in one market). *Cf. Empire Dental Co.*, 211 N.L.R.B. 860, 866-68 (1974) (closing of in-house dental clinic laboratory followed by contracting out of laboratory work). *But see Brockway Motor Trucks, Div. of Mack Trucks, Inc.*, 251 N.L.R.B. No. 23 (1980), *on remand from Brockway Motor Trucks v. NLRB, supra*, 582 F.2d 720 (3d Cir. 1978) (where total liquidation not contemplated at time of decision to close single facility, economic justification for not bargaining held insufficient) (appeal pending).

8 *See, e.g., National Family Opinion, Inc.*, 246 N.L.R.B. No. 84 (1979) (closing and contracting out of printing operations by survey research organization), *Lauer's Furniture Stores, Inc.*, 246 N.L.R.B. No. 58 (1979) (closing of subsidiary on verge of bankruptcy followed by sale of all stock); *North Carolina Coastal Motor Lines, Inc.*, 219

The Court of Appeals for the Eighth Circuit, squarely at odds with the position adopted by the Second and Third Circuits, has consistently found no duty to bargain over partial closing decisions, whether the terminated portion is a plant or a service operation. This position was most recently and cogently restated in *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1039 (8th Cir. 1976), where the court made it clear that it does not

> adopt the Board's view, which it has continued to press since its holding in *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 564-70 (1966), that an employer operating two or more plants is obligated to bargain with respect to a decision to close one of those plants. We squarely rejected that holding in *NLRB v. Drapery Manufacturing Co.*, *supra*, 425 F.2d at 1027-28, and reaffirmed our adherence to the view set forth in *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108, 110-13 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 . . . (1966), that, absent union animus, a company has no legal duty to bargain with a union over the decision to partially shut down its operations because of economic reasons. *See also Morrison Cafeterias Consolidated, Inc. v. NLRB*, 431 F.2d 254, 257 (8th Cir. 1970). [533 F.2d at 1039.]

In *NLRB v. William J. Burns International Detective Agency, Inc.*, 346 F.2d 897 (8th Cir. 1965), the same rationale was applied to the discontinuance of a service operation. More particularly, the court refused to uphold the Board's ruling that Burns' unilateral decision to terminate its only remaining service contract in Omaha constituted an unlawful refusal to bargain:

N.L.R.B. 1009, 1014 (1975); *enforced on other grounds*, 542 F.2d 637 (4th Cir. 1976) (decision to phase out uneconomical portion of trucking operations); *Pine Valley Div. of Ethan Allen, Inc.*, 218 N.L.R.B. 208, 220 (1975) (shutdown of some plant operations and auction of equipment after default on loans).

> The rationale of Fibreboard as applied to the facts of this case does not support the Board's decision. Under Darlington, the finding of lack of antiunion motivation in closing the Omaha division for economic reasons precludes a finding of unfair labor practice in refusing to bargain with the Union on the cancellation of the Creighton contract and the closing of the Omaha division. [346 F.2d at 902.]

The Fourth Circuit has adopted a substantially similar position, refusing to find a violation of Section 8(a)(5) where the employer's decision to close a part of its business is not motivated by anti-union animus constituting a violation of Section 8(a)(3) under *Darlington*. In *NLRB v. Edward M. Rude Carrier Corp.*, 79 Lab. Cas. 21,633 (4th Cir. 1976), the court held that an employer "ha[d] not abrogated its bargaining obligations" where there was no substantial evidence of anti-union motivation and "[t]he company's representative testified without contradiction that for almost two years before finally writing off this portion of its organization, the employer had considered the total cancellation of it because dissatisfied with the profits. . . ." 79 Lab. Cas. at 21,635-36. *Accord, NLRB v. North Carolina Coastal Motor Lines, Inc.*, 542 F.2d 637, 638 (4th Cir. 1976) (dictum).

In a similar fashion, the Tenth Circuit, citing *Darlington*, has held that a company "solely motivated by a sound economic reason, ha[s] no duty to bargain on the decision" to close a portion of its business. *NLRB v. Thompson Transport Co.*, 406 F.2d 698, 703 (10th Cir. 1969). The court also cited with approval the decision of the Ninth Circuit in *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933 (9th Cir. 1967),[9] which held that a

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9 The conflict between the Tenth and Second Circuits, and the divergence of views between the Ninth and Second Circuits, are accentuated by the Ninth Circuit's reliance in *Transmarine* on an earlier Second Circuit decision, *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961). In *Rapid Bindery*, the Second Circuit held that the decision to transfer work from one plant to another and to

> [c]ompany's decision, based solely on greatly changed economic conditions, to terminate its business and reinvest its capital in a different enterprise in another location as a minority partner, is not a subject of mandatory collective bargaining within the meaning of § 8(a)(5). *A decision of such fundamental importance to the basic direction of the corporate enterprise is not included within the area of mandatory collective bargaining.* [380 F.2d at 939; emphasis added]

II. THE DECISION BELOW IS ERRONEOUS, MISAPPLYING THIS COURT'S DECISIONS IN *FIBREBOARD* AND *DARLINGTON*.

In the view of this petitioner, the decision below resolves erroneously a major problem left open in *Fibreboard*, misconceiving both the legal premises of that decision and the factual character of the situation to which it is now extended.

In *Fibreboard*, this Court held only that bargaining was required in the factual setting of that case as to "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment." 379 U.S. at 215. Focusing on that limited situation, this Court provided a mode of analysis calling for reference not merely to the statutory words but also to legislative history, industrial practice and the practical suitability of the topic for collective bargaining. *Id.* at 210-13. The concurrence of three Justices was announced on grounds even more narrowly confined. *See id.* at 224 (Stewart, J., concurring).

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close the first plant "was not a required subject of collective bargaining, as it was clearly within the realm of managerial discretion." 293 F.2d at 176. In the Ninth Circuit's view, the reasoning and conclusions of the Second Circuit in *Rapid Bindery* were "sound and consistent with the principles of *Fibreboard*." 380 F.2d at 939. In contrast, the majority opinion in the present case strongly suggests that the rationale of *Rapid Bindery* did not survive this Court's *Fibreboard* holding. *NLRB v. First Nat'l Maintenance Corp.*, No. 79-4167 (2d Cir. July 9, 1980) (App. A at 4a).

Mr. Chief Justice Warren, writing for the majority, observed that imposing a duty to bargain on those facts "would not significantly abridge [the employer's] freedom to manage the business," *id.* at 213, and the three concurring Justices, concerned about the "implications . . . of disturbing breadth" contained in the majority opinion, noted that "[n]othing the Court holds . . . should be understood as imposing a duty to bargain collectively regarding . . . managerial decisions . . . which lie at the core of entrepreneurial control." *Id.* at 218, 223 (Stewart, J., concurring).

This concern was echoed by Mr. Justice Harlan (one of the concurring Justices in *Fibreboard*), writing for the majority in *Darlington*, holding that the Labor Board's failure to make adequate findings as to the employer's anti-union motivation was fatal to its finding of a violation of Section 8(a)(3) "[i]n an area which trenches so closely upon otherwise legitimate employer prerogatives." 380 U.S. at 276.

Obviously reflecting careful thought, the opinion of Judge Lasker began by tracking the several factors, only beginning but certainly not ending with the literal words of Section 8(d), that underlay the decision of this Court (and, still more clearly, the concurrence) in *Fibreboard*. Nevertheless, when it came to the actual resolution of the problem in this case, the court allowed itself, in our view, to be led astray by a narrow and undue focus upon the bare words "terms and conditions of employment."

The partial closing, the court said, "affects 'terms and conditions of employment' at least as much as does the decision to contract out which the Fibreboard Court found to fall within the literal meaning of the statute" (App. A at 5a).

With that much stated, the court proceeded directly to its "presumption" that this is a mandatorily bargainable subject. But that pretermits the difficulties presented by this subject. After all, the loss of jobs is not less a consequence of a total shutdown or liquidation. What the decisions make clear is that the loss of jobs is at most the beginning of the analysis.

The central task neglected in the decision below is defining the area of "managerial decisions . . . which lie at the core of entrepreneurial control." *Fibreboard*, *supra*, 329 U.S. at 223 (Stewart, J., concurring). When that effort is undertaken, it should lead, in our submission, to the proposition in the quoted concurrence:

> Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. [*Id.*]

And that would lead in this case, as it has repeatedly in the rulings of other circuits, to a recognition that the Greenpark closing, like similar judgments on closing or terminating installations or branches or lines of production, is not mandatorily bargainable. *See*, *e.g.*, *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1039 (8th Cir. 1976) (dicta); *NLRB v. Edward M. Rude Carrier Corp.*, 79 Lab. Cas. 21,633, 21,635-36 (4th Cir. 1976); *NLRB v. Thompson Transport Co.*, 406 F.2d 698,703 (10th Cir. 1969); *NLRB v. William J. Burns International Detective Agency, Inc.*, 346 F.2d 897, 902 (8th Cir. 1965). The dissent of Judge Kearse is sound, we think, in treating the decision to terminate as one that "was a matter of fundamental entrepreneurial discretion and was not 'suitable for resolution within the collective bargaining framework' " (App. A at 8a, quoting from *Fibreboard*, *supra*, at 223 (Stewart, J., concurring)).

It is not true on the present record, as it was in *Fibreboard*, that the "facts . . . illustrate the propriety of submitting the dispute to collective negotiation." 379 U.S. at 213. The majority opinion below, as we read it, proceeded by conjecture and speculation in treating the "facts" as if they pointed in a similar direction. So, for example, having created a presumption of mandatory bargainability, that opinion at once posited and destroyed a ground for defeating the presumption by suggesting that "bargaining could reasonably

be expected to modify or reverse [the] decision" of the employer to terminate at Greenpark (App. A at 6a). To buttress that thought, the court said:

> the union might have made concessions, by accepting reduction in wages or benefits (take-backs) or a reduction in the work force, which would in part or in whole have enabled Greenpark to give FNM an increased management fee. At least, if FNM had bargained over its decision to close, that possibility would have been tested, and management would still have been free to close the Greenpark operation if bargaining did not produce a solution. [*Id.*]

Not only does this thought lack basis in the record, but the realities appear to be quite to the contrary. First, Greenpark had no bargaining relationship with the union and was not obligated to deal with it in any way. Second, not only was the Center not required to deal with the union, Greenpark even refused to waive the 30-day stay-on provision in its contract with petitioner, something that might have allowed petitioner to remain at the Center for less than an additional month and to meet with the union (A. 99). Finally, had Greenpark been willing to suggest a reduction in staffing in order to increase petitioner's management fee, it had ample opportunity to do so in negotiations with the petitioner that took place on June 30 and on July 25, 1977 (A. 72-75).

In these circumstances, the anticipation by the court of appeals of possible concessions by Greenpark that might have allowed petitioner to remain there serves to display the unrealism, and the consequent unsoundness, of the court's rationale.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

October 6, 1980

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Appendices

Appendix A

Judgment of the Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

79-4167

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of July one thousand nine hundred and eighty.

Present:

HON. WILLIAM H. TIMBERS
HON. AMALYA L. KEARSE
Circuit Judges

HON. MORRIS E. LASKER,
District Judge

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

FIRST NATIONAL MAINTENANCE CORP.,

Respondent.

A PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

This cause came to be heard on a certified list of items comprising the record of the National Labor Relations Board and was argued by counsel.

Upon consideration thereof, it is hereby ordered, adjudged and decreed that the petition for review be and it hereby is granted in accordance with the opinion of this court with costs to be taxed against the respondent.

A. DANIEL FUSARO,
Clerk

by

(Sgd.) ARTHUR HELLER,
Deputy Clerk

Opinion of the Court

NLRB v. FIRST NAT'L. MAINTENANCE CORP.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
NATIONAL LABOR RELATIONS BOARD

v.

FIRST NATIONAL MAINTENANCE CORP.,

No. 79-4167, July 9, 1980

Application for enforcement of an NLRB order (242 NLRB No. 72). Enforcement granted.

William R. Stewart, Deputy Assistant General Counsel and L. Joseph Ferrara (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, and Elliott Moore, Deputy Associate General Counsel, with them on brief), for petitioner.

Milman, Naness & Pollack (Sanford E. Pollack, of counsel), Hewlett, N.Y., for respondent.

Before TIMBERS and KEARSE, Circuit Judges, and LASKER, District Judge.*

Full Text of Opinion

LASKER. District Judge:—This case presents the issue whether an employer has the duty to bargain with the union representing its employees as to a decision to close part of its operations.

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* Of the United States District Court for the Southern District of New York, sitting by designation.

The National Labor Relations Board (NLRB or the Board) seeks enforcement of its order of May 23, 1979[1] which, based on the findings of the Administrative Law Judge that First National Maintenance Corporation (FNM) violated sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), 158(a)(1), by refusing to bargain with the union[2] representing certain of its employees, directs FNM to bargain with the union, to reinstate those employees, and to grant them back pay.

I.

FNM is in the business of providing cleaning and maintenance services to commercial customers. During the spring of 1977, FNM serviced between two and four nursing homes. The approximately 35 employees who staffed its operation at the Greenpark Care Center (Greenpark) chose the union as their representative on March 31, 1977 and the NLRB certified the union on May 11th. On July 12th, the union wrote to FNM requesting a meeting to negotiate a collective bargaining agreement. There is no evidence that FNM responded to that letter.

During the spring and summer of 1977, FNM determined that it was losing money at Greenpark, and discontinued its services there as of August 1st. It did not notify the union before taking this action. On July 28th, FNM informed its Greenpark employees that they would be discharged on July 31st.

The same day, the union's vice president, Edward Wecker, telephoned FNM's secretary-treasurer and one-third shareholder, Leonard Marsh, requesting that FNM "stay on" at Greenpark. Marsh answered that FNM could not continue its

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1 The NLRB's order is at 242 NLRB No. 72, 101 LRRM 1177.

2 The Union elected and certified is District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO.

operation there because of financial reasons. When Wecker asked whether they could meet to discuss the situation, Marsh said, " 'We have nothing to discuss.' " The union and FNM had no further communications until the unfair labor practice charges were filed.

The NLRB found that FNM had violated Section 8(a) (5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), 158(a)(1), and ordered FNM to bargain with the union upon request as to the decision to close its Greenpark operation; if the Greenpark services were resumed, to offer reinstatement to the discharged employees, and if no agreement to resume operation were reached, to bargain as to the effects of the closing and to establish preferential hiring for the terminated employees at its other operations. The order also awarded back pay to the discharged employees.

II.

FNM does not dispute that it had a duty to respond to the July 12th letter sent by the union requesting a meeting to negotiate a collective bargaining agrvement, and the parties have stipulated as to FNM's duty to bargain as to the effects of the Greenpark closing. Consequently, the only issue before us relates to FNM's duty to bargain as to its decision to terminate its Greenpark services.

Sections 8(a)(5) and 8(d) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), 158(d), together make it an unfair labor practice for an employer to refuse to bargain with the union "with respect to wages, hours and other terms and conditions of employment." See, e.g., Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 164 (1971); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 210 (1964). The present issue, then, is whether the decision to close the Greenpark operation affected the employees' "terms and conditions of employment" within the meaning of the statute.

The seminal case on the subject is Fibreboard Paper Products Corp. v. NLRB, supra, 379 U.S. 203 (1964). There the Court held to be an unfair labor practice the employer's refusal to bargain as to the decision to contract out plant maintenance work formerly performed by its employees. Id. at 215.

The Court found that

> "The subject matter of the present dispute is well within the literal meaning of the phrase 'terms and conditions of employment.' . . . A stipulation with respect to the contracting out of work performed by members of the bargaining unit might appropriately be called a 'condition of employment.' The words even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit."

Id. at 210 (citation omitted). The Court based its decision not only on the language of the statute but on the premise that requiring an employer to bargain in the circumstances would promote the purposes of the statute, that such a requirement was supported by industrial bargaining practices in the country, and that it "would not significantly abridge [the employer's] freedom to manage the business." Id. at 210-11, 213.

Accordingly, the Court held

> "that the type of 'contracting out' involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under 8(d). Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy."

Id. at 215 footnote omitted).

Although the decision in Fibreboard takes us part of the way, it does not fully determine the issue here: the obligation of an employer to bargain in the case of the closing of part of his facilities. Fibreboard was expressly limited to its facts, and they are distinguishable on the grounds that Fibreboard involved a less significant change in the employer's business. In Fibreboard, after the decision to contract out, the business continued to operate unchanged except for the use of the employees of the subcontractor for those of Fibreboard performing the same work under the same conditions. On the other hand, in a partial closing case, a portion of the employer's business—of course, how large a portion varies with each case—ceases to operate altogether.

Moreover, in Fibreboard, the Court did not specify how the three considerations which it noted—the statute's purpose, industrial practice, and the employer's entrepreneurial prerogative—related to the initial finding whether the statute literally applied. Consequently, it is unclear whether the duty to bargain imposed in Fibreboard derived solely from a finding that the case fell within the literal reach of the statutory language or whether some or all[3] of the additional considerations noted by the Court are necessary to the imposition of a duty to bargain.

The lack of clear direction provided by Fibreboard on this point is made even more difficult by the conflicting positions taken by the NLRB and most circuit courts that, since Fibreboard, have addressed the issue of the duty to bargain in the case of a proposed partial closing.

In Ozark Trailers, Inc., 161 NLRB 561 (1966), the NLRB held to be a subject of mandatory bargaining the decision to close one of the multiple truck manufacturing plants operated by the employer. The Board disagreed with the view espoused by two circuit courts, see NLRB v. Royal Plating & Polishing

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3 This interpretation that all of the Fibreboard "factors" are a prerequisite to a duty to bargain is set forth in the discussion at 47 Geo. Wash. L. Rev. 679, 699 (1979).

Co., 350 F.2d 191 (3d Cir. 1965); NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966), that the decision whether to impose a duty to bargain should depend on how "significant" or "major" is the change contemplated by the employer. The Board noted that a significant change in the employer's business is likely to be significant from the employees' perspective as well.

> "And, just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood."

The Board also found that the purpose of the statute—to promote industrial peace—would be served by finding that the employer had a duty to bargain, and that the subject was suited to bargaining because one of the reasons for the Ozark closing was the cost of labor. Finally, the Board noted that imposition of a duty to bargain would not significantly abridge the employer's freedom to conduct his business, since

> "an employer's obligation to bargain does not include the obligation to agree, but solely to engage in a full and frank discussion with the collective-bargaining representative in which a bona fide effort will be made to explore possible alternatives, if any, that may achieve a mutually satisfactory accomodation of the interests of both the employer and the employees. If such efforts fail, the employer is wholly free to make and effectuate his decision."

On the other hand, the circuit courts until recently have generally declined to impose a duty to bargain as to a partial closing when the decision to close was based on the employer's desire to effect a shift in capital or a major change in its business, NLRB v. Adams Dairy, Inc., 350 F.2d 108, 113 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966), or was due to severe economic loss or other considerations beyond the employer's control, Royal Typewriter Co. v. NLRB, 533 F.2d

1030, 1039 (8th Cir. 1976) (dicta); NLRB v. Thompson Transport Co., 406 F.2d 698, 703 (10th Cir. 1969); NLRB v. Transmarine Navigation Corp., 380 F.2d 933, 939 (9th Cir. 1967); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 196 (3d Cir. 1965). But see NLRB v. Winn-Dixie Stores, Inc., 361 F.2d 512, 517 (5th Cir.), cert. denied, 385 U.S. 935 (1966); NLRB v. American Manufacturing Co., 351 F.2d 74, 80 (5th Cir. 1965).[4]

Recently, in an opinion that exhaustively discussed the relevant legal precedent and policy considerations, the Third Circuit treated the question whether bargaining was mandatory as to a partial closing.[5] In Brockway Motor Trucks v. NLRB, 582 F.2d 720, 734-35 (3d Cir. 1978), the court rejected a per se rule in favor of "an initial presumption, founded on statutory purposes and language, that a partial closing is a mandatory subject of bargaining," followed by an examination of the facts of each case and balancing the parties' interests in compelling bargaining or not.

On the one hand "[o]f chief concern to the employees is the prospect of losing their jobs. It is in fact difficult to imagine

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4 In NLRB v. Rapid Bindery, Inc. 293 F.2d 170, 176, (2d Cir. 196l), the Second Circuit held that the decision to transfer work from one plant to another and to close the first plant

> "was not a required subject of collective bargaining, as it was clearly within the realm of managerial discretion. However, once that decision was made, 8(a)(5) requires that notice of it be given to the union so that the negotiators could then consider the treatment due to those employees whose conditions of employment would be radically changed by the move. Nothing affects conditions of employment more than a curtailing of work, and such a curtailment is properly the subject of collective bargaining."

This decision does not compel a result contrary to that reached here since it pre-dates Fibreboard, in which, as indicated, the decision to contract out work which resulted in the layoff of employees was held to be a mandatory subject of bargaining.

5 A provocative treatment of Brockway may be found in Comment, *Duty To Bargain About Termination of Operations:* Brockway Motor Trucks v. NLRB, 92 Harv. L. Rev. 768 (1979).

any result of a decision by the employer about which labor would be more highly sensitized." Id. at 735 (footnote omitted). Accordingly, a union would naturally seek to bargain with the employer to attempt to find a way to avoid closing the facility. On the other hand, the interest of the employer in not bargaining asserted in Brockway was its "freedom to determine the company's direction" unhindered. Id. at 738.

Although the court found no evidence in the record—such as severe economic difficulties or action of a third party which would render bargaining futile—suggesting that imposition of a duty to bargain would interfere with that freedom, id. at 738-39, it refused to enforce the Board's order because the record was unclear as to the precise nature of the employer's interest in not bargaining. Id. at 740.

III.

It may be argued that a per se rule, although rejected in Brockway, 582 F.2d at 731-34, should be adopted: either imposing a duty to bargain whenever an employer closes part of its business (although the NLRB does urge this position), or absolving the employer of a duty to bargain whenever the decision to close is based on economic considerations (which is FNM's position). Yet we agree with the Third Circuit that a per se rule is inappropriate in an area whose parameters are not clearly defined by the statute or by Supreme Court precedent.

Although the rationale of Fibreboard is not altogether clear, we believe that the decision at least supports the rejection of a per se rule imposing a duty to bargain, since such a rigid approach would ignore additional relevant considerations such as the three mentioned by the Court. Fibreboard also indicates the inappropriateness of a per se rule pointing in the other direction. In rejecting the contention that the employer should not have to bargain because its decision was based on economic considerations, the Court stated:

> "although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation."

379 U.S. at 214; see Brockway, supra, 582 F.2d at 739.

We also agree with the Brockway court that the correct approach is to establish a presumption that a duty to bargain exists. A partial closing[6] affects "terms and conditions of employment" at least as much as does the decision to contract out which the Fibreboard Court found to fall within the literal meaning of the statute. Equally important is the fact that it is the employer who has access to the facts surrounding the decision to close, and consequently is in a position to justify its making that decision without first bargaining over it.

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6 In Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263(1965), the Supreme Court held that

> when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice."

Id. at 273-74 (footnote omitted). The Court distinguished a "partial" closing, however, and held that

> "a partial closing is an unfair labor practice under 8(a) (3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect."

Id. at 275. That case did not involve the question whether the employer's decision constituted a mandatory subject of bargaining, as the Court noted that

> "no argument is made that 8(a)(5) requires an employer to bargain concerning a purely business decision to terminate his enterprise. Cf. Fibreboard Paper Products Corp. v. Labor Board, 379 U.S. 203."

Id. at 267 n.5.

Since the issue is not before us, we express no opinion as to whether the distinction between a complete and partial closing recognized in Textile Workers is significant in a mandatory bargaining case.

However, we disagree with Brockway that a determinative factor should be a balancing of the respective interests of the employer and employees in bargaining. We believe that the determination whether to impose a duty to bargain should not depend on the relative injury to the employer and the employees, but rather on the relative merits of the arguments put forth as to those classic considerations of whether the purposes of the statute are furthered by the decision to impose a duty to bargain in a particular case.

Accordingly, the presumption that the employer has an obligation to bargain over a decision partially to close the business may be rebutted by showing that the purposes of the statute would not be furthered by imposition of a duty to bargain. Without an attempt to enumerate all those instances in which the presumption may be rebutted, a few examples may be noted for purposes of illustration. The employer might overcome the presumption by demonstrating that bargaining over the decision would be futile, since the purposes of the statute would not be served by ordering the parties to bargain when it is clear that the employer's decision cannot be changed. Other relevant considerations would be that the closing was due to emergency financial circumstances, or that the custom of the industry, shown by the absence of such an obligation from typical collective bargaining agreements, is not to bargain over such decisions. The presumption might also be rebutted if it could be demonstrated that forcing the employer to bargain would endanger the vitality of the entire business, so that the purposes of the statute would not be furthered by mandating bargaining to benefit some employees to the potential detriment of the remainder. This might be a particularly significant point if the number to be laid off was small and the number of the remainder was large.[7]

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7 The dissent maintains that despite our purported rejection of a per se rule favoring the imposition of the duty to bargain, in effect one has been adopted. This is not so because, as discussed in the text above, our ruling would exclude the imposition of a duty to bargain on a showing that the purposes of the statute would not be furthered

IV.

Turning to the present case, the decision to close the Greenpark operation clearly falls within the literal language of the statute. That decision terminated the employment of FNM's 35 employees there, and, as the Supreme Court has said, the words "terms and conditions of employment" do "plainly cover termination of employment." Fibreboard, supra, at 210.

FNM has offered no evidence to rebut the presumption arising from the literal application of the statute, but merely asserts that it was losing money on Greenpark. However, as discussed above, although certain considerations generally relating to economics may render bargaining futile and therefore nonobligatory, FNM has not shown that to be true of the considerations it claims prompted its decision to terminate the Greenpark operation.[8]

The dissent, noting that, as the Administrative Law Judge found, the company was losing money at Greenpark, argues that FNM was not required to bargain over the decision to terminate the Greenpark operation because those losses were not attributable to labor costs, since under the contract between Greenpark and FNM Greenpark paid FNM's employees' salaries and fringe benefits, plus a management fee. We believe, however, that the critical question is whether the purposes of the statute are advanced by imposition of a duty to bargain and that that determination does not depend

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by mandating bargaining in a particular case. We have suggested several examples of situations in which such a showing might be made.

8 The dissent, relying on Justice Stewart's concurrence in Fibreboard, concludes that FNM's decision was "a matter of fundamental entrepreneurial discretion." Although we have indicated our agreement that certain decisions may be within managerial prerogative and not subject to mandatory bargaining, the appropriate analysis to determine whether such a decision is involved in the case at hand is to inquire whether the imposition of a duty to bargain would further the purposes of the statute.

solely on whether the costs precipitating the decision to terminate were not labor originated. What appears to us to be the decisive factor, is whether, regardless of the origin of the cost which precipitated a management decision to terminate an operation, bargaining could reasonably be expected to modify or reverse that decision. On the record here, for example, there is sufficient reason to believe that, given the opportunity, the union might have made concessions, by accepting reduction in wages or benefits (take-backs) or a reduction in the work force, which would in part or in whole have enabled Greenpark to give FNM an increased management fee. At least, if FNM had bargained over its decision to close, that possibility would have been tested, and management would still have been free to close the Greenpark operation if bargaining did not produce a solution. Moreover, the dissent appears to us to be unsound in placing emphasis on the question whether the company's difficulties are attributable to non-labor costs alone. As we see it, such difficulties are the product of the company's entire history and arise from the sum of the costs involved in running a business.

Accordingly, we find that FNM had a duty to bargain with the union as to its decision to close the Greenpark operation.[9]

FNM argues that it nevertheless did bargain with the union on July 28th and 29th, and therefore satisfied its duty to bargain as to its decision to close its Greenpark services.

However, the telephone conversations, initiated by the union, consisted of little more than Marsh informing Wecker that FNM was "pulling out" of Greenpark for financial

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9 In Brockway, the court declined to enforce the NLRB order and remanded because of the insufficient factual record to enable it to balance the employer's interest in not bargaining. 582 F.2d at 739-40. That course is unnecessary here. Neither party has claimed, and we do not find, that the record is insufficient to permit determination of the question before us. see Electrical Products Division of Midland-Ross Corp. v. NLRB, No. 78-2556, Slip op. at 8-9, 103 LRRM 2908 (3d Cir. March 18, 1980).

reasons and that there was "nothing to discuss."[10] It is difficult to conceive of conduct which more clearly constitutes a failure of good faith bargaining to an impasse.

V.

FNM argues that the Board abused its power by ordering FNM to reinstate the terminated employees and awarding them backpay. The Board answers that FNM failed to except to the remedy before the Board and is therefore precluded from objecting to it here.

A condition to the right to object to the enforcement of a remedy ordered by the NLRB is that the party opposing must have excepted to the remedial portion of the order before the NLRB. NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 350 (1953); National Labor Relations Act 10(e), 29 U.S.C. 160(e).

FNM contends that its exceptions to the ALJ's decision and its accompanying brief objected to the remedial portion of the order. This is simply not supported by the documents[11] themselves which do not mention the remedy ordered.

FNM next argues that the General Counsel's cross-exceptions to the decision questioned the relief ordered and "fully bring the question of remedial relief before the Board within the meaning of Section 10(e)." However, the Board's

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10 Marsh stated during the telephone conversation that if FNM stayed at Greenpark one day, it was then bound to stay for a full 30 days. There was also some discussion concerning the possibility of persuading Greenpark to waive the 30-day contractual provision.

11 The exceptions to the ALJ's decision were:

"1. Exception is hereby taken to the conclusion of the Administrative Law Judge that the Respondent was under a duty to bargain with the Union over the decision to terminate the contract with Greenpark Care Center. . . ."

"2. Exception is hereby taken to the conclusion of the Administrative Law Judge that the Respondent failed to bargain with the Union over the effects of its decision to close the operation. . . ."

exceptions did not object to the remedy ordered. Rather they requested further relief in addition to that ordered. The General Counsel's exceptions could not have the effect of notifying the NLRB that FNM "intend[ed] to press the specific issue it now raises." NLRB v. Seven-Up Bottling Co., supra, 344 U.S. at 350.

The petition for enforcement is granted.

Concurring and Dissenting Opinion

KEARSE, Circuit Judge, concurring in part and dissenting in part:—I must respectfully dissent from so much of the majority's decision as holds that respondent violated Sections 8(a)(5) and (1) of the National Labor Relations Act (the "Act"), 29 U.S.C. §§ 158(a)(5), 158(a)(1) by refusing to bargain over its decision to close its Greenpark operation, and I would therefore deny enforcement of so much of the NLRB's order as directs respondent to pay backpay to the employees terminated.

I

There is no question that respondent failed to bargain with the union, nor any question that it was required to bargain over the effects of its decision to terminate its operations at Greenpark Care Center ("Greenpark"). See NLRB v. Rapid Bindery, Inc., 293 F.2d 170, 176 (2d Cir. 1961); Morrison Cafeterias Consol. Inc. v. NLRB, 431 F.2d 254 (8th Cir. 1970); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191 (3d Cir. 1965). To this extent I would affirm the Board's findings that respondent violated the Act.

I cannot agree, however, that respondent violated the Act by refusing to bargain over the decision to terminate. The decision to end services at Greenpark was made in order to stop losing money. This is not a case in which, as the majority states, the respondent "merely asserts" that it was losing money on the Greenpark operation. The record indicated that

during the spring of 1977 respondent had repeatedly sought an increase in its fee in order to enable it to continue services at Greenpark, stressing to Greenpark's management that respondent was losing money. The Administrative Law Judge ("ALJ") found this assertion to be true: *"It is a fact the Respondent was losing money on this job."* (Emphasis added.)

Further, in the present case the contract between respondent and Greenpark required Greenpark, in addition to paying a set management fee, to pay respondent's "gross weekly payroll and fringe benefits" for that facility. It was the amount of the management fee, over and above the labor costs, on which respondent and Greenpark could not agree. Thus, the facts are that respondent was losing money on the Greenpark job, that its losses were not due to labor costs,[1] and that its solution for these losses was to close down the losing operation.

I do not believe that the carefully limited decision in Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964), or any other authority, requires the respondent to bargain over its decision to terminate Greenpark in order to halt these losses.[2] See Morrison Cafeterias Consol. Inc. v.

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1 This distinguishes such cases as Ozark Trailers, Inc., 161 NLRB 561(1966) in which the company's actions were prompted in large part because of the cost of labor. Even in a case where a partial closing is due to labor costs, it may be that a labor union's legitimate interests are adequately protected by the employer's duty to bargain over the effects of the closing, as distinguished from the decision itself to close. There is no need to reach that question here.

2 The majority states that, like the Third Circuit in Brockway Motor Trucks v. NLRB, 582 F.2d 720 (3d Cir. 1978), it recognizes merely a presumption, and not a per se rule, that there is a duty to bargain over a partial closing. Looking at the results of the two cases, however, it appears to me that the majority comes rather near to imposing that per se rule. In Brockway, the parties had stipulated that the partial closing was based on "economic considerations." The nature of these considerations was not disclosed in the record, and thus it could not be known whether or not that respondent had actually been losing money on the closed operation. In those circumstances the presumptive duty to bargain was not adequately rebutted. Yet the

NLRB, supra. In Fibreboard the Supreme Court ruled that "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment" violated the requirement of § 8(d) of the Act that an employer bargain about "conditions of employment ." Id. at 215. Unlike the present case, Fibreboard involved the replacement of employees in an ongoing operation. (And unlike the present case the costs sought to be shaved in Fibreboard were labor costs.) The opinions in Fibreboard are instructive in distinguishing its "contracting out" situation from that of the present case.[3] Thus, the majority opinion observed as follows:

> The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.
>
> The company was concerned with the high cost of its maintenance operation. It was induced to contract out the work by assurances from independent contractors

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Brockway court did not grant enforcement, but denied the Board's petition without prejudice. In the present case, the established facts are considerably less compelling from the Board's point of view. There is a record on which the ALJ expressly found that in fact respondent was losing money; and the record shows that those losses were not due to labor costs. Yet here, the majority promptly grants enforcement.

3 Far from deciding such questions as a decision to terminate an operation altogether, Fibreboard did not purport to reach even "other forms of 'contracting out' or 'subcontracting.' " Id. at 215.

> that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments. These have long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework . . .

Id. at 213-14. Justice Stewart's concurring opinion stresses that certain managerial decisions, such as the decision to close a business, which obviously will affect employment, do not implicate "conditions of employment" within the meaning of § 8(d):

> Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.

Id. at 223.

I conclude that the respondent's decision in this case to conserve its capital by closing a losing operation was a matter of fundamental entrepreneurial discretion and was not "suitable for resolution within the collective bargaining framework."

II

Respondent has challenged in this Court both the order directing it to reinstate terminated employees and the backpay

award. The Board argues that these questions are not properly before the Court because respondent's letter of exceptions to the ALJ's decision was "silent on remedy and too general in form to have placed the Board on notice that the Company objected to the remedy in the event its position did not prevail." (Board brief at 21.) This position has some merit with respect to the Board's direction that respondent offer to reinstate terminated employees in comparable positions in other facilities served by respondent; that order was properly based on respondent's failure to bargain over the effects of its termination decision, and I would agree that respondent is barred from attacking that portion of the remedy.

Nevertheless, I would not hold the respondent barred from challenging the backpay award, because that award is based on the determination that the company violated the Act by failing to bargain over the termination decision itself. Since I find this premise faulty, I find no basis for the backpay award and would deny enforcement of that portion of the Board's order. NLRB v. Rapid Bindery Inc., supra, 293 F.2d at 177.

Decision and Order of the National Labor Relations Board

242 NLRB No. 72

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 29—CA—5808

FIRST NATIONAL MAINTENANCE CORP.

and

DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL—CIO

DECISION AND ORDER

On November 24, 1978, Adminstrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge as modified.[1]

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1 The General Counsel excepts, *inter alia*, to the failure of the Administrative Law Judge to find additional violations of Sec. 8(a)(1) and (5) based on the allegations in the complaint that Respondent failed to bargain with the Union prior to its termination of its operation at the Greenpark Care Center. The Administrative Law Judge made all the necessary factual findings with respect to these allegations but failed to set forth his conclusions. We adopt his factual findings, and based thereon conclude that Respondent in violation of Sec. 8(a)(5) and (1) refused to bargain with the Union by failing to

The Adminstrative Law Judge found, and we agree, that Respondent violated both Section 8(a)(5) and (1) of the Act when it refused to bargain about its decision to discontinue its operation at the Greenpark Care Center and the effects thereof on the unit employees. To remedy these violations the Administrative Law Judge's recommended Order requires Respondent to bargain with the Union about the decision and its effects and to provide for backpay for the terminated employees from the date of their termination until one of the four stated conditions is met. The General Counsel urges that these provisions be adopted. However, he contends that certain additional remedies should be provided to protect the rights of the employees under the Act. We find merit in certain of these contentions.

The termination of this operation and the consequent loss of employment by its employees stemmed from Respondent's failure to bargain over that decision and its effects at a time when a measure of union bargaining power existed. As meaningful bargaining can be assured here only if some economic strength is restored to the Union, and a bargaining order alone cannot serve as an adequate remedy for the unfair labor practices Respondent has committed, we deem it necessary, in order to effectuate the purposes of the Act, to order the following remedy which provides redress with a view toward restoring the bargaining conditions, as nearly as possible, to those which would have existed but for Respondent's illegal conduct.

1. We shall order Respondent to bargain, upon request, with the Union as the exclusive bargaining representative of the employees in the appropriate unit with respect to the decision to terminate its operation at the Greenpark Care Center and the possible resumption thereof. If Respondent agrees to resume its Greenpark Care Center operation, it shall

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respond to the Union's letter dated July 12, 1977, demanding such bargaining.

offer all those terminated employees in the appropriate unit reinstatement to their former jobs or, if those no longer exist, to substantially equivalent positions, and shall embody any understanding reached in a signed agreement.

2. If Respondent fails to agree to resume its Greenpark Care Center operation, Respondent shall be required to bargain, upon request, with the Union with respect to the effects on the unit employees of the decision to terminate the Greenpark Care Center operation, and shall establish a preferential hiring list of all employees in the appropriate unit following a nondiscriminatory system, such as seniority. Respondent shall offer the terminated employees who were employed at the Greenpark Care Center operation reinstatement to positions at any of their other cleaning and maintenance operations which become available, by the discharge, if necessary, of any persons employed since July 31, 1977, the date the Greenpark Care Center operation was terminated. Respondent and the Union shall reduce to writing any agreement reached as a result of such bargaining.

3. Further, we shall order Respondent to make whole the employees in the appropriate unit by payment of backpay from July 31, 1977, the date of their termination, until the occurrence of the earliest of the following conditions: (1) the date Respondent bargains to agreement with the Union on the subjects pertaining to the decision to close its Greenpark Care Center operation and the effects of the closing upon the unit employees;[2] (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this decision, or to commence negotiations within 5 days of Respondent's notice of its desire to bargain with the Union; (4) the subsequent failure of the Union to bargain in good faith. Backpay, less earnings during the applicable period, shall be computed on the basis set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest computed in

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2 *Mobil Oil Corporation*, 219 NLRB 511 (1975); *P. B. Mutrie Motor Transport, Inc.*, 226 NLRB 1325 (1976).

the manner prescribed in *Florida Steel Corporation,* 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

We have found that Respondent refused to bargain following the certification. In order to insure that the employees will be accorded the services of their selected bargaining agent for the period provided by law, the initial year of certification will begin on the date that Respondent commences to bargain in good faith with the Union as the bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, First National Maintenance Corp., New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively, upon request, with District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL—CIO, hereinafter the Union, as the exclusive bargaining representative of their employees in the following appropriate unit:

> All housekeeping employees employed at Greenpark Care Center, exclusive of all other employees, technical and professional employees, guards and supervisors as defined in Section 2(11) of the Act.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive bargaining representative of all employees in the aforesaid appropriate unit, and further bargain with respect to its decision to terminate its operation at the Greenpark Care Center and possible resumption of operations and, if an understanding is reached, embody such understanding in a signed agreement and offer reinstatement to the terminated employees of this operation. If Respondent fails to resume its operation at Greenpark Care Center, in accord with the section of this Decision entitled "The Remedy, Respondent shall bargain with the Union concerning the effects of the decision to terminate said operation, establish a preferential hiring list of all employees in the appropriate unit following a nondiscriminatory system, bargain about its mode of operation, and offer to its terminated employees in the appropriate unit reinstatement to positions for which they are qualified at any of their other cleaning and maintenance operations, discharging, if necessary, persons employed since July 31, 1977. Any understanding reached shall be embodied in a signed agreement.

(b) Make whole those employees of Respondent who were discharged from that location on July 31, 1977, by payment of backpay in the manner and for the period set forth in this Decision.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilities in New York, New York, copies of the attached notice marked "Appendix"[3] and mail copies thereof to all employees of Respondent who were employed at its Greenpark Care Center operation at the time of its termination. Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. May 23, 1979

HOWARD JENKINS, JR., *Member*

BETTY SOUTHARD MURPHY, *Member*

JOHN C. TRUESDALE, *Member*

NATIONAL LABOR RELATIONS BOARD

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3 In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Decision of the Administrative Law Judge

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CASE 29-CA-5808

FIRST NATIONAL MAINTENANCE CORPORATION
and

DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO

STEPHEN E. APPELL, ESQ., for the General Counsel.

SANFORD E. POLLACK, ESQ. of Gutterman & Pollack, of Valley Stream, NY, for the Respondent.

MR. EDWARD A. WECKER, Vice President, and SIPSER, WEINSTOCK, HARPER, DORN & LEIBOWITZ, ESQS., of New York City, NY, for the Charging Party.

DECISION

Statement of the Case

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held before Administrative Law Judge Benjamin K. Blackborn, on July 5, 1978, in Brooklyn, New York City. The charge was filed on August 3, 1977, by District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, here called the Union, against First National Maintenance Corporation, here called the Respondent, or the Company, and the complaint issued on October 7, 1977. The issue presented is whether the Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union as required by law. A brief was filed by the Respondent. Before issuing a decision Judge Blackburn died. On November 8,

1978, the Board's Chief Administrative Law Judge designated the undersigned to prepare and issue a decision on the existing record.

Upon the entire record I make the following:

Findings of Fact

I. The Business of the Respondent

The Respondent, a New York State corporation, with its principal office and place of business in New York City, New York, is engaged in providing and performing housekeeping, cleaning and maintenance services and related services for various commercial customers. During the past year, a representative period, it purchased and caused to be transported and delivered to its place of business cleaning products and other goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to its place of business directly from out-of-state sources. I find that the Respondent is engaged in commerce within the meaning of the Act.

II. The Labor Organization Involved

I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

During the spring of 1977 the Respondent, by contract and as a separate employer, was doing the maintenance work for the Greenpark Care Center, a nursing institution in Brooklyn, New York, here called Greenpark or the Home. Its employees at that location totalled about 35. The Respondent hires workmen to do like maintenance for other commercial enterprises under separate contract at other locations, just how many the record does not show. Asked how many other nursing homes his company services, Leonard Marsh, an

officer of the Respondent and one third owner, answered: "I would venture to guess between two and four." It was an evasive answer, unless the Respondent's overall operations are so extensive the secretary-treasurer cannot keep in mind how many are of a particular type.

In any event, on March 31, 1977, the Respondent's employees at this one location voted in a Board-conducted election and chose the Union as bargaining agent; on May 11 the Regional Director certified the Union as exclusive bargaining representative. I will assume Respondent was formally advised soon thereafter in writing by the Board, as is always the case in Board representation proceedings. Later, by letter dated July 12, the Union wrote the Company, reminded it of the certification and asked for a meeting to negotiate a contract. The Company never answered the letter. On July 28, 1978, Marsh, of the Company, told all of the employees working for him at this Home that 3 days later, July 31, all of them would be discharged. Not one of them had had any prior notice of the intended action. Informed, that same day, of what was about to happen, Edward Wecker, vice-president of Local 1199, immediately communicated with Marsh, and with Mr. Pelman, administrator of the Home, in a panic attempt to delay matters with the hope of averting disaster to the employees. All Wecker got from Marsh on the telephone was that it was a matter of money and that it was too late to do anything about it or even discuss the matter at all. The people were fired on July 31, and Marsh never did meet with any representative of the Union.

However phrased, the essential allegation of the complaint is that this unilateral change in the conditions of employment of employees represented by a certified exclusive bargaining agent, without even a semblance of opportunity to the Union to speak on their behalf, was a direct violation of the statutory obligation to bargain, and therefore an unfair labor practice under Section 8(a)(5) and (1) of the Act. That the Respondent knew—before uttering one word to the Union or to the employees of its intent—that the employees were regularly and

lawfully represented by an exclusive agent, cannot be questioned. In fact, Marsh had for over 2 weeks been holding, and ignoring, the Union's written request for bargaining. And that the discharge of a man is a change in his conditions of employment hardly needs comment. In these obvious facts, the law is clear. When an employer's work complement is represented by a union and he wishes to alter the hiring arrangements, be his reason lack of money or a mere desire to become richer, the law is no less clear that he must first talk to the Union about it. This Respondent did not. And when Wecker tried to talk with the owner, he was faced with mere restatement of a fait accompli. He may have tried to stall matters, but Marsh was impervious, for economic reasons I am sure, but stone deaf nonetheless. This is a big company. For all I know the 35 men at this particular home were only a piddling part of its total business in the New York area. If Wecker had been given an opportunity to talk, might something had been worked out to transfer these people to other parts of the Respondent's business? The cases speak of an employer's duty, when he cannot avoid reducing his staff, to discuss its "effects" with their bargaining agent. Entirely apart from whether or not open discussion between the parties—with the Union speaking on behalf of the employees as was its right—might have persuaded the Respondent to find a way of continuing this part of its operations, there was always the possibility Marsh might have persuaded the Home to use these same employees to continue doing its maintenance work, either as direct employees or as later hires by a replacement contractor. Yet there never was any talking, any meeting, any opportunity to the Union for bargaining with the Respondent.

On the face of the story, there appears a very clear unfair labor practice. What really remains for consideration are the defense arguments made by the Respondent.

Its principal defense is the contention that the parties did in fact negotiate about this entire matter, and that therefore in no event can there be a finding of refusal to bargain. Called as

an adverse witness by the General Counsel, owner Marsh had difficulty remembering anything, including statements of fact appearing in telegrams he had himself written. Repeatedly his answers were: "It could be," "It is possible," "I can't recall," "Maybe," etc. This about what must have been a significant experience for his company, what with the financial loss it suffered at this particular job. These observations are made here because the testimony of Wecker, which stands uncontradicted (Marsh did not testify in defense about the now asserted bargaining at all) must be believed. All Marsh could recall about talking with Wecker was that the Union agent spoke with him on the telephone, asked why he was quitting the job and would he remain another month, and that his only reply was he was losing money and "couldn't afford" to remain. Marsh also admitted his company never responded to the Union's demand letter of July 12 and never offered to discuss the discharges of all these people with their union.

It is a fact the Respondent was losing money on this job. As far back as March 17, 1977, the Home gave it 30 days notice of cancellation of their contract because of the maintenance staff's lack of efficiency. Apparently the two companies straightened things out and the work continued. On June 30 they talked and the Respondent asked for a $500 weekly raise in "profits," meaning, I suppose, a raising of the fee paid for the services, and on July 6 Marsh informed the Home in writing that unless the increase were granted his company would discontinue the work on August 1. By telegram dated July 25 he gave such final notice. And, as stated above, the employees were first informed on July 28 about the intended discharges to come 3 days later.

Wecker testified that that same day, July 28, he spoke twice with Marsh on the phone, always he calling the Respondent. Wecker first asked Pelman, of the Home, could he keep the employees on and Pelman said no, because as he read the contract between the Home and the Respondent the Home was precluded from even considering hiring these employees for 90 days. Talking then to Marsh, Wecker asked what was

going to happen to the employees, but the only answer he got was that the Respondent was "pulling out" because it was not receiving enough money. Wecker then asked ". . . could he [Marsh] hold on a little longer until we could sit down and discuss the matter and see how to keep the people working," and again Marsh said "no," this time on the ground that he would have to stay a full 30 days if he stayed even one, according to the contract. Marsh told Wecker if he, Wecker, could persuade Pelman to waive the 30 day clause, "he might be able to swing it so we could be able to sit down and discuss it." Still on the phone, Wecker asked about possible employment at other locations of the Respondent, and received only a simple negative. Wecker's final statement as a witness was: "I asked that we meet and try to discuss the matter. He said, 'We have nothing to discuss.' "

The Respondent calls this brief talk on the telephone that day full bargaining to impasse over both the decision to discharge and its effects upon all the 35 employees. I disagree. What these facts show in totality is that the Respondent from the very start had no intention of considering either the employees' or the Union's opinion or desire in this mass discharge. Marsh simply refused to meet with the Union or to discuss anything, although obligated to do so in law. His indifference to the statutory obligation was first manifested by the Respondent's failure even to respond to the demand for bargaining received on July 12. To say no more than "it is a money problem," or "we cannot afford not to discharge the people," is a far cry from exchanging views and thoughts as to how, if possible, the economic hurt could be avoided or at least reduced. I find the Respondent in fact refused to talk with the Union about an absolutely mandatory subject of collective bargaining.

As to law, the defense argues that its decision to cancel out this particular one of the many simultaneous operations was not a mandatory subject of collective bargaining. In support it cites an occasional case where the Board found exactly the opposite of the Respondent's present view, but where a Court

of Appeals disagreed. A hearing examiner in these proceedings is bound to apply Board law, unless reversed by the Supreme Court. See, *Ozark Trailers, Inc.*, 161 NLRB 561, 566.

> If ever there was a business in which taking on, finishing, or discontinuing this or that particular job is no more than a regular and usual method of running its affairs, it is this Respondent's overall activity. There was no capital involved when it decided to terminate the Greenpark Center job. The closing of this one spot in no sense altered the nature of its business, nor indeed, so far as appears, did it substantially affect its total size. The Board's language in a very recent decision is particularly applicable here: ". . . where it has not been shown that Respondent's decision to close involved such a 'significant investment or withdrawal of capital' as to 'affect the scope and ultimate direction of the enterprise,' we conclude that by refusing to bargain with the Union concerning the decision to close the . . . facility, Respondent has thereby violated Section 8(a)(5) and (1) of the Act." *Brockway Motor Trucks*, 230 NLRB 1002. See, also, *Fibreboard Paper Products* v. *N.L.R.B.*, 379 U.S. 203.
>
> A substantial element in the legal argument by the Respondent here is that there was no way of keeping these 35 employees on the job, that talk would have been futile anyway because the Greenpark location was a losing proposition. But the theory misconceives the law as established. The legal obligation to accord recognition to a statutory representative of its employees, and particularly to give it an opportunity to discuss alternatives where an employer wishes to discharge them even for economic reasons, does not mean the employer must make economic concessions, or agree to any condition to its disadvantage. Of course there have been attempts at collective bargaining which have failed to yield mutually desirable results. As has been said too many times to warrant repetition, the results of collective bargaining are

not germane to the statutory requirements of the Act. From the Supreme Court language in *Fibreboard Paper Products, supra:* ". . . although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation."

I find that by ignoring the certified exclusive bargaining agent of its employees in deciding to discharge all its employees at the Greenpark Center location, and by refusing to bargain with the Union on request, the Respondent has violated and is violating Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

In remedy, the Respondent must be ordered to bargain in good faith with the Union now on the subject of its decision to terminate the Greenpark Center operation, with its consequent discharge of the employees, as well as with respect to effects of such action. And to effectuate the purposes of the Act the Respondent must be ordered to make whole all the employees thus fired for monetary losses suffered as a result of the violation, from the date of their discharges until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on these subjects, pertaining to the decision to close the Greenpark Center and the effects of the closing upon the unit

employees; (2) a bona fide impasse in bargaining within 5 days of this Decision, or to commence negotiations within 5 days of Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith.

Conclusions of Law

1. First National Maintenance Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By unilaterally closing its Greenpark Care Center operation and terminating its employees there without bargaining with the Union about the decision to discontinue the operation or about its effects upon the employees, the Respondent has refused to bargain and has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[1]

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1 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the

ORDER

The Respondent, First National Maintenance Corporation, New York City, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning the decision to discontinue its operations at the Greenpark Care Center, New York City, and its effects upon the employees there, with District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, as the exclusive representative of its employees in the following appropriate unit:

> All housekeeping employees employed at Greenpark Care Center, exclusive of all other employees, technical and professional employees, guards and supervisors as defined in Section 2(11) of the Act.

(b) In any other manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive bargaining representative of all employees in the aforesaid bargaining unit with respect to its decision to discontinue the Greenpark Care Center, and with respect to the effects thereof upon the employees, and if an understanding is reached, embody such understanding in a signed agreement and offer reinstatement to the terminated employees.

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findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Make whole all those employees of the Respondent who were discharged from that location on July 31, 1977, by the payment of backpay from the date of their termination to the date the Respondent bargains in good faith with the Union in accordance with the provisions provided above under the section entitled The Remedy.

(c) Mail copies of the attached notice marked Appendix[2] to all employees of the Respondent previously employed at the Greenpark Care Center.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. November 24, 1978

Thomas A. Ricci

Administrative Law Judge

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2 In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Appendix B

National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3), (5), 158(d)

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .